Supreme Court, U.S.
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No. 98-1194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STEELTEK, INC.,

Petitioner,

v.

RANDY D. GRIFFIN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Steeltek's Statement of the Case is generally correct *except* for the first sentence in the first full paragraph at page 2 of the Petition.[1] The Tenth Circuit more properly characterized the claim and evidence in this regard as follows:

> Rather, the sole basis of Griffin's claim was that Steeltek violated the ADA by asking these two questions and then by not hiring him because of his responses to these improper questions . . .
>
> Because the district court ruled as a matter of law that Griffin had failed to establish a prima facie case because he was neither disabled nor perceived to be disabled, the court never reached the issue of whether Griffin was causally injured by being required to answer the impermissible questions. Additionally, the court did not rule whether Steeltek's proffered reason for not hiring Griffin — that he lacked two years of grinding experience — was pretextual. The district court did observe, however, that "the parties dispute whether this requirement [of two years grinding experience] was ever revealed to [Griffin], or whether the requirement actually existed." By acknowledging that the issue of injury and the bona fides of Steeltek's proffered reasons were in dispute, the district court implicitly acknowledged that summary judgment would not be appropriate at this time on those grounds.

Petition for Writ of Certiorari, pp. 3a - 4a.

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1. "Steeltek declined to hire any of the applicants because none, including Griffin, had two years of experience as a grinder."

REASONS FOR DENYING THE WRIT

I.

THE TENTH CIRCUIT OPINION DOES NOT CONFLICT WITH DECISIONS BY THE FIFTH OR SEVENTH CIRCUITS.

One of the grounds for granting a Petition for Writ of Certiorari is a conflict among the circuits. Petitioner claims that ground here. However, a review of the decisions relied upon in the Fifth[2], Seventh[3] and Tenth Circuits shows no conflict.

Both the Fifth Circuit and Seventh Circuit cases turned upon the factual determination therein that there was no causal connection between any damages and the illegal questions. Both appear to have assumed that there was a cause of action for asking illegal questions, while concluding that under the facts of their respective cases there was no remedy to be afforded. The Tenth Circuit in this case held that there was a cause of action and, because it could not foreclose on the facts the possibility of a remedy, remanded the district court for consideration of that issue. The Tenth Circuit is not in any way in conflict with the Fifth or Seventh Circuits on the issue presented to this Court.

In *Armstrong*, the court said that the issue under 42 U.S.C. § 12112(d) has "many strands interwoven in the tangle of issues that envelops" it. 141 F.3d at 558. The Court there chose to "unravel . . . only a few of the many strands."

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2. *Armstrong v. Turner Industries, Inc.*, 141 F.3d 554 (5th Cir. 1998).

3. *Hunter v. Habegger Corporation*, 139 F.3d 901, 1998 WL 104635 (7th Cir. 1998).

The Fifth Circuit began its analysis by noting this Court's distinction between a cause of action and a remedy, holding that the former can exist when the latter does not. *See Davis v. Passman*, 442 U.S. 228, 239 (1979). The Fifth Circuit *assumed* a cause of action such as has been brought in the instant action. It *determined* that there was no remedy based upon the findings of fact at the district court level.

Such analysis is not contrary to what the Tenth Circuit has done in this case. Here the circuit court held that there was a cause of action arising from the prohibited questions and accepted the district court's conclusions that there were material issues of fact justifying a trial on the question of the remedy (causation and damages).

Thus, the Fifth Circuit assumed the cause of action and determined that the facts of that case foreclosed any available remedy; in this case the court held that there was a cause of action and also that there were issues of fact as to whether there would be a remedy or not. There is no conflict.

The Seventh Circuit used a similar rationale, although the analysis is not as explicit. That court, in considering the ADA claim stated that the violation "does not entitle [Plaintiff] to relief." *Hunter* at **2. It then stated that

> plaintiff would have to show more than a wrongful inquiry to prevail on anything other than a request for an injunction. Plaintiff would have to demonstrate that but for the wrongful inquiry plaintiff would have been either retrained or hired as an employee. Plaintiff is unable to show this here because he was terminated due to his uninsurability and not as a result of anything relating to the inquiry into his workers' compensation history.

Hunter at **2 (footnote omitted). Thus, the Seventh Circuit implicitly assumed a *cause of action*, but held that, under the factual circumstances in that case, there was no remedy — the illegal inquiry did not, in fact, cause any damages.

The Seventh Circuit appended to its decision with approval the Memorandum of Decision and Order from the district court. The district court noted that Hunter was not qualified to hold the job he sought — he could not drive a truck because he was uninsurable. The district court noted that to prevail on anything other than a request for injunction, "it would have to be shown that but for the wrongful inquiry Plaintiff would have been retained (or hired) as an employee." The court then noted that, although the employer inquired into Plaintiff's workers' compensation history, the inquiry

> was negative. It is illogical to assume that an individual was not hired because of the improper inquiry where the inquiry did not disclose anything adverse to the individual.

Hunter at **13. Again, the above citations show that the district court in *Hunter* denied the claim, not because there was not a cause of action for asking the illegal questions,[4] but because there was no remedy where there were no damages.[5]

Thus, the Tenth Circuit held there was a cause of action, while the Fifth and Seventh Circuits assumed one. The Tenth

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4. The district court noted that the employer in *Hunter* did not disagree that the inquiry was illegal. *Hunter* at **13.

5. Both the district court and Seventh Circuit in *Hunter* noted that an injunction would be inappropriate in that case because the employer had already agreed with the EEOC not to ask the opprobious questions anymore.

Circuit could not rule out a remedy based on the presented facts, while the Fifth and Seventh Circuits could. There is no conflict in the *law* as applied by the three circuits.

II.

THE TENTH CIRCUIT HAS FOLLOWED THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

What the Tenth Circuit has done is to consider the text of the ADA and interpret it using well-recognized principles of statutory construction. It has done this based upon prior precedent in the Circuit. It has looked at the policy considerations behind the statute. It has then come to its interpretation of what the statute means. The Tenth Circuit has in no way "so far departed from the accepted and usual course of judicial proceedings" as to call for an exercise of the Supreme Court's power of supervision.

CONCLUSION

Wherefore, Griffin requests this Court to deny certiorari and allow this matter to proceed forward in the district court.

Respectfully submitted,

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